No. 96-1314

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

In re: EDWARD W. ENGLANDER and PHYLLIS S. ENGLANDER,

Petitioners,

vs.

GEORGE E. MILLS, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners misstate the questions which would be reviewed by this Court if the writ were granted. The questions are as follows:

1. Whether under Florida law a parcel of indivisible real property which grossly exceeds the acreage limitation imposed by the Florida Constitution on homestead exemptions qualifies as exempt homestead and is immune from forced sale.

2. Whether the Eleventh Circuit Court of Appeals abused its discretion by denying a request to certify a question to the Florida Supreme Court.

PARTIES INVOLVED

The Respondents are:

1. George E. Mills, Jr., Chapter 7 Bankruptcy Trustee of Edward W. Englander and Phyllis S. Englander.

2. Transamerica Commercial Finance Corporation ("Transamerica"). The parent company of Transamerica is Transamerica Inventory Finance Corporation.

3. First Union National Bank of Florida ("First Union"). The parent company of First Union is First Union Corporation. The nonwholly owned subsidiaries of First Union are:

Cantebury of Hilliard, Ltd.

Ellenton Housing Associates, Ltd.

Floral Oaks Apartments, Ltd.

General Homes Corp.

Greenleaf Village of Groveland, Ltd.

Jacksonville Affordable Housing, Ltd.

Lantana Associates, Ltd.

Ravenwood of Kissimmee, Ltd.

Rosemont Manor Ltd.

River Reach of Orange County, Ltd.

Spinnaker Reach Apartments of Duval, Ltd.

Spring Gate Manor Limited

Steeplechase Apartments, Ltd.

TWC Eight-Eight, Ltd.

Villa Biscayne of South Dade, Ltd.

West Brickell Apartments, Ltd.

Westville, Ltd.

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APPENDIX

Appendix A — Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption Filed December 8, 1992 ..... 1a

OPINIONS BELOW

Respondents supplement Petitioners' citations to opinions below by reproducing in the Appendix (hereinafter "App.") the Bankruptcy Court's Order on Allocation Issues Related to the Objection to the Claimed Homestead Exemption entered on December 8, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions cited by Petitioners are not relevant to the questions presented for review. The relevant provisions are as follows:

1. Constitutional provisions.

(a) Article X, Section 4 of the Florida Constitution:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> > (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres

> of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(b) Article V, Section 3 of the Florida Constitution:

> . . . (b) JURISDICTION. — The supreme court:
>
> > . . . (6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

2. Statutory provisions.

(a) Section 25.031, Florida Statutes:

> The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to

> the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

STATEMENT OF THE CASE

Respondents are in substantial agreement with Petitioners' statement of the case but would make the following corrections and clarifications:

In discussing their Motion for Certification of Question of Law to Supreme Court Florida, Petitioners' state that no Florida state court has considered the precise question presented. Although the precise question has not been considered, there is a substantial body of Florida law dealing with similar or analogous questions. The Eleventh Circuit relied on this body of law to resolve the question without certification.

In discussing the facts of this case, Petitioners omit the fact that they twice concealed or misrepresented the size of their claimed homestead. Petitioners later attempted to designate an exempt portion of the property in a manner which would have

prevented all access to the nonexempt portion "other than by helicopter." *In re Englander*, 156 B.R. 862, 868 (Bankr. M.D. Fla. 1992). These facts formed the basis of the Bankruptcy Court's finding that Petitioners committed fraud in connection with claiming the exemption. *Id.* at 871. The Bankruptcy Court held that this fraud was an additional ground for denying the exemption. *Id.*

Petitioners state that the Bankruptcy Court ordered a sale of the property and allocation of the sale proceeds "according to an equitable formula determined by the Bankruptcy Court." (Petition, p. 10). In fact, the parties stipulated to a formula for allocating the sale proceeds. (App., p. 3a). This agreed formula was then approved by the Bankruptcy Court. (App., pp. 3a-5a).

Finally, Petitioners mischaracterize the reasoning of the Eleventh Circuit by stating that the court "used Florida joint tenancy law to conclude that general creditors could force the sale of the Florida residence." (Petition, p. 12). The Eleventh Circuit relied on the language of the Florida Constitution and the substantial body of case law decided thereunder to conclude that the indivisible property which grossly exceeded the acreage limitation imposed by the Constitution did not qualify as exempt homestead and was subject to forced sale under Florida law .

REASONS FOR DENYING THE WRIT

Respondents oppose the granting of the writ for the following reasons:

I.

AS THE LOWER COURTS BASED THEIR DECISIONS ON STATE LAW AND NOT FEDERAL PREEMPTION OR FEDERAL EQUITY LAW, THERE IS NO REASON TO GRANT THE WRIT.

Petitioners contend that the Bankruptcy Court ordered a forced sale of the property "under the federal bankruptcy code where no such right existed under state law." (Petition, p. 13). Relying on this assertion, Petitioners contend that review should be granted to address issues of "federal preemption and federal equity law." (Petition, p. 16).

Contrary to Petitioners' contentions, none of the decisions below depended on preemption or federal equity principles. The lower courts relied on the language of the Florida Constitution and case law interpreting the Florida Constitution to conclude that the 1.05 acre property did not qualify as exempt homestead property and that a forced sale of the property and equitable allocation of the sale proceeds was permissible under Florida law.

The Bankruptcy Court noted that the one-half acre limitation on a homestead "is the inexorable command of the [Florida] Constitution." *In re Englander*, 156 B.R. at 868-869. The court further noted that the Florida Supreme Court had authorized the sale of homesteads under circumstances where a forced sale was necessary to protect the interests of others in the property. *In re Englander*, 156 B.R. at 870, *citing Sonneman v. Tuszynski*, 139 Fla. 824, 191 So. 18 (1939); *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978). Finally, the Court cited the Florida rule that "the homestead exemption cannot be used, even in conjunction with zoning laws, to unjustly impose upon the rights of creditors." *In re Englander*, 156 B.R. at 870, citing *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448 (1943).

Based on these principles, the Bankruptcy Court denied the claimed homestead exemption and held that a forced sale of the property and allocation of the sale proceeds was permissible under Florida law because the sale was necessary to enforce the acreage limitation imposed by the Florida Constitution and to prevent the use of the homestead exemption from unjustly imposing on the rights of creditors. *In re Englander*, 156 B.R. at 870. It is clear that the Bankruptcy Court resolved the claimed exempt homestead issue by determining that the property was subject to forced sale under Florida law, not by imposing federal equity or preemption law.[1]

Adhering to the reasoning of the Bankruptcy Court, the District Court concluded that the forced sale of the property and allocation of the sale proceeds was consistent with "Florida's constitutional homestead exemption provision" and the case law interpreting such provision. (Petitioners' App., pp. 18-23) Without mentioning federal equity or preemption law, the District Court affirmed the Bankruptcy Court's denial of the claimed homestead exemption and its order directing a sale of the property and allocating the sale proceeds.

The Eleventh Circuit noted that Florida law requires that property claimed as exempt meet all of the requirements of the Florida Constitution for exemption. *In re Englander*, 95 F.3d

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1. Additionally, the Bankruptcy Court concluded that the homestead exemption could be denied as a matter of bankruptcy law due to the Petitioners' misleading and fraudulent actions in connection with claiming the exemption. *In re Englander*, 156 B.R. at 871, *citing Hardage v. Heritage Nat. Bank*, 873 F.2d 1319 (5th Cir. 1988); *In re Williamson*, 804 F.2d 1355 (5th Cir. 1986); *In re Doan*, 672 F.2d 831 (11th Cir. 1982). The District Court did not address this issue on appeal stating that it was not "germane to the Bankruptcy Court's ruling." (Petitioners' App., p. 16). Similarly, the Eleventh Circuit never reached the issue. The District Court and the Eleventh Circuit based their decisions exclusively on Florida law as discussed *infra*.

1028, 1031 (11th Cir. 1996), *citing Smith v. Guckenheimer*, 42 Fla. 1, 17, 27 So. 900, 915 (1900). The court found that these requirements included the requirement that the property not exceed one-half an acre in an incorporated area. *Id.* The court emphasized the Florida rule that the exemption "is intended to be a shield, not a sword, and should not be applied as to make it an instrument of fraud or as an imposition upon creditors." *In re Englander*, 95 F.3d at 1031, *citing Palm Beach Savings & Loan Association, F.S.A. v. Fishbein*, 619 So. 2d 267 (Fla. 1993); *Orange Brevard Plumbing & Heating Company v. La Croix*, 137 So. 2d 201, 203 (Fla. 1962); *Hillsborough Inv. Co.*, 152 Fla. at 891, 13 So. 2d at 450.

Based on these and other principles of Florida law, the Eleventh Circuit held that a forced sale of the property and allocation of the sale proceeds was permissible because the "property exceeds the limitation on area set by the Florida Constitution and is indivisible." *In re Englander*, 95 F.3d at 1032. In so holding, the Eleventh Circuit neither relied on nor made reference to preemption or federal equity law.

Rule 10 of this Court's rules provides that a writ of certiorari will only be granted for compelling reasons. If a writ were granted in the instant case, the issue before this Court would be whether the Eleventh Circuit and the other lower courts correctly interpreted Florida law. The issue of whether a lower federal court correctly interpreted state law is not a compelling reason to grant a writ within the meaning of the Rule 10. This Court has repeatedly held that questions of state law are best decided by lower federal courts skilled in the law of a particular state. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484, n. 13 (1986); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 224, n. 10 (1985), quoting from *Propper v. Clark*, 337 U.S. 472, 486-487 (1949).

In addition, certiorari is not proper where the question presented for review was not addressed by the lower courts. *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) (the practice of this Court is to refrain from addressing issues not addressed by the court of appeals); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (same). None of the courts below relied on or addressed federal preemption or equity law. The writ should therefore be denied.[2]

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2. At least two other bankruptcy courts in Florida have adopted the reasoning of the Bankruptcy Court and concluded that a forced sale of a claimed homestead was permissible under Florida law in circumstances similar to those of the instant case. *In re Baxt*, 188 B.R. 322 (Bankr. S.D. Fla. 1995) (following Bankruptcy Court's reasoning that indivisible property which exceeded the acreage limitation was subject to forced sale); *In re Wierschem*, 152 B.R. 345 (Bankr. M.D. Fla. 1993) (relying on Bankruptcy Court's holding to order forced sale of property where homestead was improperly claimed).

The decisions of the Florida bankruptcy courts are consistent with decisions of federal courts which have reached similar results applying the homestead laws of other states. *In re Evans*, 51 B.R. 47 (Bankr. D. Vt. 1985) (holding forced sale of property permissible under Vermont law where property exceeded state's $30,000 value limitation); *O'Brien v. Heggen*, 705 F.2d 1001 (8th Cir. 1983) (affirming decision authorizing forced sale of property that exceeded limitation on area imposed by Minnesota law).

Viewed as a whole, the above decisions reveal a uniform interpretation of state homestead law which permits a forced sale of claimed homestead under the circumstance of the instant case. Accordingly, there is no conflict among the federal courts which would serve as grounds for granting the writ.

II.

A DECISION BY THE ELEVENTH CIRCUIT TO DENY A REQUEST TO CERTIFY A QUESTION TO THE FLORIDA SUPREME COURT IS NOT A COMPELLING REASON TO GRANT THE WRIT.

Petitioners contend that the Eleventh Circuit improperly failed to certify the claimed homestead exemption question to the Florida Supreme Court. This contention is without merit and does not constitute a compelling reason to grant the writ under Rule 10.

The certification issue does not raise any unsettled issue of federal law. This Court set forth the standard governing certification requests in *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) where it stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . [i]ts use in a given case rests in the sound discretion of the federal court.

Petitioners have not shown that the Eleventh Circuit abused its discretion in declining to certify a question of state law or that the Eleventh Circuit has disregarded this Court's rulings regarding certification.[3]

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3. The Eleventh Circuit frequently uses certification where appropriate. Some of the cases it has recently certified to the Florida Supreme Court include *Mosher v. Speedstar Div. of AMCA Intern., Inc.*, 52 F.3d 913 (11th Cir. 1995); *Savona v. Prudential Ins. Co. of America*, 51 F.3d 230 (11th Cir. 1993); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 18 F.3d 1555 (11th Cir. 1994); *Legal Environmental Assistance Foundation, Inc. v. Brevard County, Fla.*, 10 F.3d

(Cont'd)

The Eleventh Circuit properly exercised its discretion in the instant case in denying the certification request. Article V, Section 3 of the Florida Constitution provides that a question should be certified only if it is "determinative of the cause." *See also* § 25.031, Fla. Stat. (1996). Resolution of the Florida law issues would not have been determinative of the cause in the instant case. Had the Florida law issues been resolved in Petitioners' favor, two unresolved issues of bankruptcy law would have remained. The first of these was whether as a matter of bankruptcy law the exemption could have been denied based on Petitioners' misleading and fraudulent actions in connection with claiming the exemption. *In re Englander*, 156 B.R. at 871, *citing Hardage v. Herring Nat. Bank*, 873 F.2d 1319 (5th Cir. 1988); *In re Williamson*, 804 F.2d 1355 (5th Cir. 1986); *In re Doan*, 672 F.2d 831 (11th Cir. 1982). The second issue was whether the trustee had the power to sell Petitioners' interest in the property under 11 U.S.C. § 363(f).[4]

(Cont'd)

1579 (11th Cir. 1994); *Yanakakis v. Chandris, S.A.*, 9 F.3d 1509 (11th Cir. 1993); *Benitez v. Standard Havens Products, Inc.*, 7 F.3d 1561 (11th Cir. 1993); *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391 (11th Cir. 1993); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 991 F.2d 1533 (11th Cir. 1993); *Allstate Insurance Co. v. Prasad*, 991 F.2d 669 (11th Cir. 1993); *Dempsey v. United States*, 989 F.2d 1134 (11th Cir. 1993); *Miele v. Prudential Bache Securities*, 986 F.2d 459 (11th Cir. 1993); *LeCroy v. McCollam (In re McCollam)*, 955 F.2d 678 (11th Cir. 1992); and *Securities and Exchange Commission v. Elliott*, 953 F.2d 1556 (11th Cir. 1992). It certifies questions to other state supreme courts, as well. *See, e.g., Corporation of Mercer University v. National Gypsum Co.*, 832 F.2d 1233 (11th Cir. 1987).

4. The Eleventh Circuit never reached these issues of federal law as it concluded that the property did not qualify as exempt homestead property under Florida law.

The Eleventh Circuit properly decided not to certify a question which could have left unresolved issues of federal law. The Florida Supreme Court could not have properly exercised jurisdiction over the question because it would not have been "determinative of the cause" as required by Article V, Section 3 of the Florida Constitution and § 25.031, Fla. Stat. (1996).

CONCLUSION

The petition for writ of certiorari should be denied and the Court should grant such other relief as is just and proper under the circumstances.

Respectfully submitted,

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APPENDIX A — ORDER ON ALLOCATION ISSUES RELATED TO THE OBJECTION TO THE CLAIMED HOMESTEAD EXEMPTION FILED DECEMBER 8, 1992

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 90-3798-6C7

IN RE:

EDWARD W. ENGLANDER
PHYLLIS S. ENGLANDER

Debtors.

ORDER ON ALLOCATION ISSUES RELATED TO THE OBJECTION TO THE CLAIMED HOMESTEAD EXEMPTION

This matter came before the Court as the second step in resolving an objection to a claim of exemption as to homestead property. The objection was filed by the Trustee in this case (the original Trustee has been succeeded by George E. Mills, Jr.) and two creditors: the First Union National Bank of Florida and Transamerica Commercial Finance Corporation (the three parties collectively the "Objectors").

The dispute involves 1.05 acres (the "Property") in the City of Winter Park, Florida, on which sits the Debtors' residence. The Debtors and the Objectors agree that the property under applicable zoning and building regulations cannot be subdivided. The Florida Constitution limits a homestead exemption within a City to .5 acres.

Appendix A

Debtors originally claimed all of the Property as their homestead exemption. After the Objectors contested Debtors' right to claim 1.05 acres as their homestead, the Debtors amended their claim of homestead exemption to limit it to .5 acres. The Debtors' configuration of their .5 acres left the bankruptcy estate ("Estate") with .55 acres that were completely surrounded by the Debtors .5 acres, with the Estate's property having no ingress or egress.

As no dispute existed as to any material facts, the issue of Debtors' entitlement to a homestead exemption was considered on motions for summary judgment.

This court, in its September 10, 1992, Order Granting Partial Summary Judgment ("Summary Judgment Order"), determined that the claimed homestead exemption was not allowable for two reasons.

> 1. the legal description in the amended claim of the portion of the 1.05 acres claimed as homestead exemption was "hopelessly defective"; and
>
> 2. the configuration by Debtor of the .5 acres selected as their homestead "legally and practically" eliminated any reasonable value from the non-exempt portion of the Property.

Debtors were granted the opportunity to further amend their claim of homestead exemption.

The court then determined that as the Property could not be divided a sale of the Property was necessary for the Estate to

realize the value of its interest. Further, the court recognized that upon a sale of the Property there would be an issue as to how the proceeds from the sale should be allocated. It is this issue of allocation, and other issues related to allocation of the sale proceeds, which is the subject of this Order.

Pursuant to court order the Objectors and Debtors filed their Joint Pre-Trial Stipulation on October 23, 1992, which contained an agreed formula for allocating proceeds from a sale of the Property. Additionally, the Pre-Trial Stipulation identified certain procedural and legal issues which remained for determination. These remaining issues were briefed by both parties. The court has considered the Brief of Objectors ("Objector's Brief") and the Debtors' Brief ("Debtors' Brief"), and heard oral argument of counsel on November 16, 1992. Accordingly it is

ORDERED AND ADJUDGED

ALLOCATION OF SALE PROCEEDS

The parties have stipulated that proceeds from a sale of the Property be allocated in the following manner

1. The Trustee, at the estate's expense, shall file an application to retain an appraiser to appraise the subject property which shall be in the following form:

> a. A fair market value appraisal of the entire property, consisting of land, house and garage (the house and garage hereafter called "residence").
>
> b. A fair market value appraisal of the 1.05

acres of land, assuming no improvements were erected thereon.

2. If for any reason the appraisal is unacceptable to the Trustee he may seek an additional appraisal, subject to Debtors' right to object to an additional appraisal.

3. The appraisal accepted by the Trustee shall be the basis for determining the ratio of the land value to the total value of the property, unless the appraisal values are disputed.

4. If the Debtors dispute the values in the appraisal accepted by the Trustee, the Debtors shall file a motion to determine the value of the entire property and the value of the land; if the Debtors do not file such a motion within ten days after receipt by Debtors' attorney of notification that the attached appraisal has been accepted by the Trustee and that the ten day period has commenced, the ratios established by the Trustee's appraisal shall be binding.

5. When the ratios have been determined, either by the Trustee's appraisal or by Court order, the ratio of the value of the land to the total value of the residence and land shall be the ratio which shall be applied to determine the interests of the respective parties in proceeds derived from a sale of the subject property.

6. The proceeds of the sale payable to the Estate shall be determined as follows:

11/21 X *Value of Vacant Land* X Gross Sales
Price Value of Entire Property

Appendix A

7. By way of illustration, assuming a vacant land appraised value of $500,000.00, an entire property appraised value of $700,000.00, and a gross sales price of $800,000.00, the proceeds payable to the Estate would be:

11/21 X 5/7 X 800,000 = $299,319.73

The foregoing procedure for determining value and the formula for allocating proceeds shall apply in this case.

METHOD OF SALE

Objectors urge that a method of sale should be established at this time in order to prevent later appeals on that issue. In the Debtors' Brief the Debtors acknowledged the need for an order that would permit resolution of all issues in one appeal.

This case has been pending for more than two years. An appeal in this matter will prolong administration of the case, and that administration should not be further prolonged by deferring ruling on this issue. The following procedures are therefore established as the method of sale.

1. Debtors shall have the opportunity to retain the property by paying to the Estate the amount to which the Estate would be entitled based on the appraisal accepted by the Trustee; provided, however, said opportunity must be exercised within seven days after the appraisal is furnished to Debtors' attorney, Peter N. Hill, by giving written notice thereof to Trustee's attorney, Samuel J. Zusmann, Jr.; provided further, if Debtors dispute the appraisal and seek a Bankruptcy Court determination of values, the time for giving notice shall run from the entry of a final order determining said values.

Appendix A

2. In the event the Debtors timely exercise their opportunity to retain the property, closing shall occur within sixty days after the giving of written notice. If Debtors fail to close within said time period Debtors shall not have any further opportunity to purchase the property except by offering a sum at least 10% in excess of that which the Estate would receive under an accepted offer to purchase.

3. Trustee shall file an application to retain a real estate broker to sell the subject property.

4. Debtors shall retain their right to object to the broker selected, the commissions to be paid, and other terms of the retention.

5. When an offer acceptable to the Trustee is received, the Trustee shall give notice of his intention to sell.

6. Debtors shall retain their right to object to the sale, but only as to the terms of the sale.

7. No offer shall be accepted if it does not provide for payment in full of the sale price at closing, unless otherwise authorized by the Bankruptcy Court.

8. At the closing of a sale to a third party the funds due to the Debtors and to the Estate shall be distributed in accordance with the final order on allocation; provided, however, in the event the parties disagree as to the amount to be paid to each party no proceeds shall be distributed to either party and said proceeds shall be held by the Trustee in a separate interest bearing account pending a determination by the Bankruptcy Court of the amounts to be distributed to the parties. Any such disputes shall be limited

to mathematical calculations relating to the allocation of the sale proceeds and shall not include any dispute as to the percentage allocations established by the final order on allocation.

9. In the event Debtors elect to retain the property and timely close, the Estate shall pay Debtors for property taxes and Debtors shall pay interest to the Estate on the same basis as provided for allocation of sale proceeds in the final order on allocation; provided further, in such event Debtors shall be responsible for all closing costs including documentary stamps and recordings fees.

DETERMINATIVE DATE FOR VALUING PROPERTY

The parties differ as to what date should be used to determine the value of the Property. Objectors assert the appropriate date is the date the case was filed ("Petition Date"). Debtors contend the date should be September 10, 1992, which is the date of the Summary Judgment Order; no authority is cited in support of Debtors' contention.

Entitlement to an exemption is determined as of petition date; the value of an exemption should be determined as of the same date. *In re Girard,* 98 B.R. 685, 688 (Bankr. D. Vt. 1989); *In re Dvorznak,* 38 B.R. 178 (Bankr. E.D.N.Y. 1984); *Rappaport v. Commercial Banking Corporation,* 19 B.R. 971 (Bankr. E.D. Pa. 1982). Therefore, the date to be used for determining value for the allocation formula shall be Petition Date.

ALLOCATION OF SALE EXPENSES

At issue here is the allocation of expenses relating to a sale

of the Property. Debtors contend that all expenses should be the obligation of the Estate; Objectors contend that such expenses should be allocated in the same fashion as the sale proceeds.

In the context of this case, the factual situation falls within, or is consistent with, the language and intent of 11 U.S.C. § 363(j). The distribution of sale proceeds, and the responsibility for costs, should both be "according to the interest of such . . . co-owners, and of the estate." Therefore, sale expenses shall be allocated between the Debtors and the Estate in the same ratio as the sale proceeds.

RESPONSIBILITY FOR PROPERTY TAXES

This case has been pending for more than two years; barring a settlement, it is possible that the appeal process will extend administration for another two or more years. An issue exists as to who will pay the taxes on the Property pending a final resolution of this dispute.

The Debtors have been in possession of the Property since Petition Date; they have paid the Property Taxes since Petition Date; and they have had the use and benefit of the property since Petition Date. At the present time the Estate does not have use of any portion of the Property and is deriving no benefit from the Property. Under these circumstances, responsibility for payment of taxes on the Property shall continue to be that of the Debtors.

ULTIMATE LIABILITY FOR PROPERTY TAXES

If upon a final resolution of this dispute the Debtors prevail they will have paid taxes on their property and the Estate would

have no liability to Debtors for such tax payments. However, if the Estate prevails and effects a recovery from its portion of the Property then the Estate shall be liable to the Debtors for the Estate's allocable share of post-petition date taxes; provided, however, for the year 1990 the Estate's liability for taxes shall be only for the period commencing on Petition Date. The Estate's allocable share shall be determined in the same manner as the allocation of sale proceeds. Additionally, the Estate shall be liable to the Debtors for interest on the amounts spent by Debtors on behalf of the Estate, with the interest to be computed from the date of each payment made by the Debtors.

LIABILITY OF DEBTORS FOR INTEREST

Objectors contend that if the ultimate resolution in this case is in favor of the Estate the Debtors should be liable to the Estate for interest on the Estate's portion of the sale proceeds from Petition Date. Debtors deny such liability.

If the Objectors prevail the portion of the Property which is not allowable as a homestead exemption would have been property of the Estate since Petition Date. The litigation by Debtors has prevented the Estate (and the creditors) from realizing on that interest in the Property. The Debtors contend that they have good grounds for contesting the Estate's right to sell the Property and, therefore, they should not have any liability for interest. The court disagrees.

In preference litigation there are often good grounds for asserting defenses under 11 U.S.C. § 547(c). The fact that such defenses are asserted in good faith does not mean that the unsuccessful preference defendant will not be liable for interest prior to entry of judgment. *See Turner v. Davis, Gillenwater &*

Lynch (In re Investment Bankers, Inc.,), 135 B.R. 659 (Bankr. D. Colo. 1991); *Parmelle v. Bank of Greensburg (In re L & T Street Fabricators, Inc.)*, 102 B.R. 511 (Bankr. M.D. La 1989).

Circumstances may dictate that liability for interest should accrue as of a recovery demand or from the time a transfer was made. See *In re Production Steel, Inc.*, 60 B.R. 4 (Bankr. M.D. Tenn. 1986.) See also *L & T Steel*, 102 B.R. 511, 521-522 and case cited therein.

Under the circumstances of this case, as set forth in the Summary Judgment Order, Debtors should be liable to the Estate for interest on the Estate's allocable share of the sale proceeds, and that liability should commence as of Petition Date.

INTEREST RATE

It having been determined that upon an ultimate resolution of this case in favor of the Objectors the Estate and the Debtors would have liability to the other for interest, a determination must be made as to the appropriate interest rate. The parties agree, and the Court concludes, that the interest rate specified in 28 U.S.C. § 1961 in effect on the applicable dates should apply.

As to interest to be paid by the Estate to the Debtors, the rate would be that in effect on the date of each tax payment made by the Debtors. As to interest to be paid by the Debtors to the Estate, the rate would be that in effect on Petition Date.

TIME TO INCUR APPRAISAL EXPENSES

The Objectors urge that an appraisal should be obtained at

this time. Debtors contend that if they ultimately prevail there would be no need for an appraisal and that expenses would have been incurred needlessly.

In their bankruptcy schedules the Debtors valued the Property at $700,000; sixteen months earlier they had valued the Property at $900,000. Clearly substantial amounts are at issue here. Absent an appraisal the Trustee is unable to judge the appropriateness of any settlement offer made, formulate a settlement offer or a counter-offer, or justify any motion to compromise this controversy. The opportunity for compromise should not be precluded by delaying an appraisal until appellate resolution of this matter. Therefore, the Trustee should obtain an appraisal at this time.

In the Summary Judgment Order the court disallowed the claim of homestead exemption but granted Debtors additional time to file an amended claim of homestead exemption. On November 19, 1992 Debtors filed their Notice Of Third Amendment To Schedule B-4, Correcting Legal Description Of Real Property Claimed Exempt As Homestead. As amended, the description conforms to that on the survey map which is Exhibit A to the Summary Judgment Order. No effort was made to change the configuration of the property claimed as homestead exemption.

The Court has previously held that this configuration of property legally and practically eliminated any reasonable value from the non-exempt portion of the property and, therefore, debtors' claim of homestead exemption as set forth in its Third Amendment to Schedule B-4 Correcting Legal Description of Real Property Claimed Exempt as Homestead is DENIED.

Appendix A

DONE AND ORDERED in Chambers this 4th day of December, 1992.

s/ J. Wendell Roberts
J. WENDELL ROBERTS
UNITED STATES BANKRUPTCY JUDGE